



## Bill Draft 2011-RBz-20A: Unemployment Insurance Changes.

2011-2012 General Assembly

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<b>Committee:</b>	Revenue Laws Study Committee	<b>Date:</b>	May 1, 2012
<b>Introduced by:</b>		<b>Prepared by:</b>	Cindy Avrette
<b>Analysis of:</b>	2011-RBz-20A		Committee Counsel

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**SUMMARY:** *2011-RBx-20 includes several changes to the unemployment laws that fall within these three categories:*

- *The extension of the three-year look-back period from January 1, 2012, to January 1, 2013.*
- *The resolution of outstanding issues associated with S. L. 2011-401, Senate Bill 532.*
- *The statutory change required to comply with the federal Trade Adjustment Assistance Extension Act of 2011 this year.*

### CHANGE IN THE LAW TO CONTINUE THE THREE-YEAR LOOK-BACK TRIGGER FOR EXTENDED BENEFIT

There are two permanent benefit programs required by federal law: regular unemployment benefits and extended benefits.<sup>1</sup> Regular unemployment benefits are fully funded by the State through its State Unemployment Insurance Trust Fund and claimants in North Carolina are eligible to receive benefits for up to 26 weeks under it. Extended benefits are available in a state when the state is experiencing high levels of unemployment.<sup>2</sup> The program is funded 50% by state contributions and 50% by the federal government. However, the federal government has paid 100% of the extended benefit claims since February 22, 2009.<sup>3</sup>

Extended benefits are triggered in a state when the unemployment rate is at least 6.5% and at least 10% higher than it was at the same time in either of the past two calendar years; this two-year window is known as the "two-year look-back". In the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010<sup>4</sup>, Congress allowed states to amend their laws to temporarily increase the two-year look-back period to a three-year look-back period. This measure enabled more states to offer extended benefits. Under the 2010 legislation, the temporary measure ended December 31, 2011. However, Congress extended the temporary measure twice.<sup>5</sup> It is currently set to expire December 31, 2012.

North Carolina changed the law to permit a three-year look-back in S.L. 2011-145, Section 6.16. This provision expired January 1, 2012. *Legislative Proposal #2* would extend the sunset from January 1, 2012, until January 1, 2013. In North Carolina, extended benefits will not be allowed for claim weeks

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<sup>1</sup> Congress enacted Emergency Unemployment Compensation in 2008, known as EUC08. These benefits are fully payable by the federal treasury.

<sup>2</sup> In North Carolina, a claimant may receive up to 20 weeks of extended benefits.

<sup>3</sup> P.L. 111-5, Sec. 2005, approved February 19, 2009, *American Recovery and Reinvestment Act of 2009*. The provision has been extended several times in other federal legislation. The current expiration date for federal funding of extended benefits is December 31, 2012.

<sup>4</sup> P.L. 111-312, approved December 17, 2010.

<sup>5</sup> P.L. 112-78, approved December 23, 2011, *Temporary Payroll Tax Cut Continuation Act of 2011*. P.L. 112-96, approved February 22, 2012, *The Middle Class Tax Relief and Job Creation Act of 2012*.

later than May 12, 2012, because the State's unemployment rate has fallen below the trigger. However, it is possible the extended benefits may trigger back "on" before the end of the year.

The Governor ordered the Employment Security Commission to use the three-year look-back in Executive Order 93, dated June 3, 2011. The Governor ordered the Division of Employment Security to use the three-year look-back in Executive Order 113, dated January 11, 2012. Although the Executive Orders purport to give the Governor the authority to make this change, the federal law clearly states that a "State may by law" provide for the temporary look-back extension.<sup>6</sup> *Legislative Proposal #2*, finds that the Governor did not have the authority under federal law, the North Carolina Constitution, or Chapter 96 of the North Carolina General Statutes to change the look-back period.

## **RESOLUTION OF OUTSTANDING ISSUES FROM S.L. 2011-401, SENATE BILL 532**

The General Assembly enacted Senate Bill 532 on July 26, 2012. The Senate passed the bill on June 2, 2011, by a vote of 43 to 5. The House passed the bill on June 15, 2011, by a vote of 104 to 12. Senate Bill 532 had four operative parts:

- It created the Division of Employment Security within the Department of Commerce and transferred the functions of the Employment Security Commission to that Division.
- It made the Division subject to rulemaking under Article 2A of chapter 150B of the General Statutes.
- It made substantive changes to the employment security laws.
- It made conforming changes to the employment security laws.

On June 30, 2011, the Governor vetoed the bill. In the Governor's Objections and Veto Message, she stated the U.S. Department of Labor informed the administration that a lack of conformity between the bill and federal law could result in a loss of money for the State's unemployment insurance program and a reduction in the FUTA tax credit.<sup>7</sup> A state's law must conform to the provisions of the federal unemployment compensation laws in order for employers in a state to be eligible for a credit against the FUTA tax and for the state to be eligible to receive an administrative grant to operate its unemployment compensation programs.

The General Assembly overrode the Governor's veto on July 26, 2011.<sup>8</sup> After passage of the bill, the Employment Security Commission informed the General Assembly by a letter dated October 12, 2011, of its intention to suspend the provisions of the bill determined by the U.S. Department of Labor to be noncompliant with federal law. G.S. 96-19(b) gives the Division of Employment Security the authority to suspend enforcement of a provision upon receiving notification from the U.S. Department of Labor that the provision is noncompliant with the requirements of federal law. The suspension may be in effect until the Legislature next has an opportunity to reconsider the provisions purported to be noncompliant with federal law.

*Legislative Proposal #2* addresses the areas of concern noted by the U.S. Department of Labor:

- Senate Bill 532 expanded the time for an employer to provide information required to protest a claim from 10 days to 30 days. The U.S. Department of Labor noted that the extension of time

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<sup>6</sup> P. L. 11-312, approved December 2010, Sec. 502, *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010*.

<sup>7</sup> The FUTA tax rate is 6% and is imposed on wages up to \$7,000 a year. Federal law provides a credit against the tax liability of up to 5.4% to employers who pay state taxes timely under an approved state unemployment insurance program. The 2012 effective FUTA tax rate for NC employers is 0.9%, which is approximately \$63 per employee.

<sup>8</sup> The Senate voted to override the veto on July 13, 2011, by a vote of 31 to 17. The House voted to override the veto on July 26, 2011, by a vote of 72 to 47.

would make it virtually impossible for the agency to make timely determinations under the standards set by federal regulations.<sup>9</sup>

- An individual is totally disqualified from receiving benefits if the Division of Employment Security determines the individual was discharged for misconduct connected with the work. Senate Bill 532 expanded the definition of "misconduct connected with the work" to include both of the following:
  - Arrest for or conviction of certain offenses. The U.S. Department of Labor noted that the new definition did not require that the criminal conduct be connected with the individual's work.
  - Failure to adequately perform employment duties after being warned. The U.S. Department of Labor noted that, in order to be the basis for a disqualification to receive unemployment benefits, unsatisfactory job performance must be the result of intentional behavior or gross negligence, and must be egregious.
- Senate Bill 532 allowed the parties to tender stipulation of the ultimate issues in cases pending on appeal to the agency. The U.S. Department of Labor noted that while a stipulation of facts might be acceptable, a stipulation of the issues vitiates the agency's federally-mandated responsibility to apply the unemployment law to specific facts. The Department also recommended that any procedure or process by which an appeals referee or hearing officer accepts a stipulation of fact should be recorded.

Senate Bill 532 created a Board of Review<sup>10</sup> to determine appeals policies and procedures and to hear appeals arising from the decisions and determinations of the Employment Security Section and the Employment Insurance Section. The annual salaries of the three-person board are to be set by the General Assembly in the current Operations Appropriations Act. The Current Operations and Capital Improvements Appropriations Act of 2011 did not set the salaries for the members of the Board of Review. *Legislative Proposal #2* provides that the current Operations Appropriations Act of 2012 must provide for the annual salaries of the Board of Review, as provided in G.S. 96-4(b).

## **COMPLIANCE WITH THE TRADE ADJUSTMENT ASSISTANCE EXTENSION ACT OF 2011**

In 2002, the United States General Accounting Office issued a report on the unemployment insurance program and the need for an increased focus on program integrity. The focus of President Obama's Executive Order 13520, issued November 23, 2009, was the reduction of improper payments in major programs administered by the federal government, including the unemployment insurance program. In response to the level of improper payments in the unemployment insurance program, the U.S. Department of Labor developed a strategic plan to address the root causes of improper payments. The plan involves new performance measures for the states; increased funding of new tools and technology; and a focus on the root causes leading to improper payments. The three identified root causes leading to improper payments are:

- A gap in employment service registration.
- Claimants continuing to claim benefits after returning to work.
- Untimely and insufficient separation information from employers and third party administrators.

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<sup>9</sup> For most intrastate claims, federal regulations require that a state pay at least 87% of its claims within 14 days of the end of the first compensable week, or 21 days for states that do not have a waiting week requirement, and 93% of such claims within 35 days.

<sup>10</sup> G.S. 96-4(b).

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As part of the increased focus on program integrity, the U.S. Department of Labor recommended legislative language to Congress in June of 2011. In October 2011, three key integrity provisions recommended by the Department were enacted as part of the Trade Adjustment Assistance Extension Act of 2011. *Legislative Proposal #2* includes the statutory change North Carolina must make to be in conformity with the program integrity provisions this year. States have until October 21, 2013, to enact the other two conforming changes; those changes are not included in this proposal.

The New Hire Directory was created years ago to assist states with the collection of child support payments. The Directory is administered by the Department of Health and Human Services. The directory is also a valuable tool for unemployment insurance programs because it allows an agency to cross-check claimants with new hires. This information assists the agency with the detection of overpayments being made to individuals who have returned to work. To address the gap in employment service registration, the Trade Adjustment Assistance Extension Act of 2011 requires states to expand the definition of a 'newly hired employee' to include a rehired employee who was separated for at least 60 days. It also requires employers to enter the start date of employment when the employer submits the information to the New Hire Directory. States are required to make the necessary statutory changes to its New Hire Directory provisions within two months after the latest legislative session ends. *Legislative Proposal #2* includes the necessary changes.

The other two changes, which do not have to be made before October 2013, are not included in this proposal. The first of those two changes addresses claimants who fraudulently continue to accept unemployment benefits after returning to work by requiring the states to impose a penalty on the claimant equal to 15% of the amount of an erroneous overpayment if it determines the overpayment is due to fraud. The money collected from the penalty is payable to the State Unemployment Trust Fund and its use is limited to the payment of unemployment compensation benefits. The second of those two changes addresses the untimely and insufficient separation information provided by employers and third party administrators to the agencies by requiring states to enact a provision prohibiting the non-charging of employer's unemployment insurance account when an improper payment is made because of the employer's failure to respond timely or adequately to a written request for separation information. This provision points to a trend whereby employers are expected to improve the quality of information provided to state employment agencies at the front end of the unemployment insurance claim process, rather than waiting until a hearing to provide details.

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